1 2 BEFORE THE PERSONNEL APPEALS BOARD 3 STATE OF WASHINGTON 4 5) Case No. DISM-04-0118 6 ROBERT EVANS, FINDINGS OF FACT, CONCLUSIONS OF 7 LAW AND ORDER OF THE BOARD Appellant, 8 v. 9 UNIVERSITY OF WASHINGTON, 10 Respondent. 11 12 I. INTRODUCTION 13 1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER 14 T. HUBBARD, Chair; BUSSE NUTLEY, Vice Chair; and GERALD L. MORGEN, Member. The 15 hearing was held at the University of Washington, South Campus Center, Seattle, Washington, on 16 October 27 and 28, 2005, and January 20, 2006. 17 18 1.2 **Appearances.** Appellant Robert Evans was present and was represented by Jean Schiedler-19 Brown, Attorney at Law. Jeffrey W. Davis, Assistant Attorney General, represented Respondent 20 University of Washington. 21 22 1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for the causes 23 of harassment, retaliation, failure to follow university policy and failure to abide by supervisory 24 directives. Respondent asserts that Appellant engaged in harassing and intimidating behavior 25 toward a fellow co-worker. 26 Personnel Appeals Board 2828 Capitol Boulevard

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II. FINDINGS OF FACT

2.1 Appellant Robert Evans was a permanent employee for Respondent University of Washington. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on December 2, 2004.

2.2 Appellant began his employment with the University of Washington in December 2000. Appellant was hired as a Control Technician for the Operations and Maintenance Department at the University of Washington Medical Center (UWMC). Appellant's job included HVAC maintenance

2.3 By letter dated December 8, 2004, Lisa Brandenburg, Chief Operating Officer for the

UWMC, notified Appellant of his dismissal for just cause, including but not limited to the reasons

of harassment, retaliation, failure to follow University policy and failure to follow supervisory

direction. Appellant's dismissal was effective at the end of the work day on December 23, 2004. A

memorandum dated October 6, 2004, from Operations Manager Ken Feilen to Ms. Brandenburg,

outlined the allegations against Appellant. In summary, the memo described a pattern of harassing

and intimidating behavior by Appellant toward Custodian Duvia Fernandez.

2.4 The Board heard the testimony of 10 witnesses over a period of three days. After reviewing

all of the testimony and exhibits, we find the weight of the evidence supports that Appellant, more

likely than not, engaged in misconduct towards $\mbox{\sc Ms.}$ Fernandez.

2.5 Sometime in the spring of 2004, Ms. Fernandez, whose native language is Spanish, was introduced to Appellant, who was seeking a Spanish-speaking tutor. Ms. Fernandez agreed to assist

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Appellant and the two met during her break times. In addition, Appellant and Ms. Fernandez exchanged cell phone numbers and spoke during non-work hours about Spanish lessons as well as some personal conversations. Sometime in the month of June 2004, Ms. Fernandez began a second job, and as a result, she had less time to tutor Appellant. On June 19 and 20, Ms. Fernandez told Appellant that she was too busy to tutor him.

2.6 On July 7, 2004, Appellant received a letter of reprimand after the University determined he and another employee, Dorrand Wilburn, were guilty of engaging in inappropriate conduct with each other. Appellant's letter also encompassed a reprimand for an incident in which Appellant invaded another employee's personal space. In that incident, Appellant admitted he reached for Francisco Luna's picture identification badge and turned it so that the employee's photo/name tag would show. The letter of reprimand directed Appellant to treat others with professionalism and respect and informed him that failure to improve in his interactions with others and to follow the University's values could result in disciplinary action.

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2.7 Although Ms. Fernandez was not directly involved in the incidents for which Appellant was reprimanded, she was friends with Mr. Wilburn and Mr. Luna. After these incidents, Ms. Fernandez became uncomfortable and she decided not to communicate with Appellant.

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2.8 In July and August 2004, Appellant called Ms. Fernandez' cell phone approximately 12 times. Ms. Fernandez, however, did not respond to Appellant or return any of his calls. Appellant left Ms. Fernandez a variety of messages on her voicemail. In some messages, he asked why she was angry at him, he told her he was sorry he ever met her, he called her a liar, and in another message he told her she "would pay."

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2.9 In early August, Appellant approached Custodian Aseres Kassa, a co-worker and friend of

Ms. Fernandez, to ask why Ms. Fernandez was so angry with him. Ms. Kassa, who was cleaning a

women's restroom when Appellant entered to make his inquiry, told Appellant she did not know

why, but she agreed to talk to Ms. Fernandez. Ms. Fernandez told Ms. Kassa that Appellant had

called her a liar and that she was afraid of Appellant. When Appellant approached Ms. Kassa the

next day, she told him that Ms. Fernandez did not want to be friends with him and to stay away

from Ms Fernandez. When Appellant pressed for an answer to why Ms. Fernandez was so angry,

Ms. Kassa indicated that it was because he had called Ms. Fernandez a liar. Appellant's face was

red and Ms. Kassa perceived that he was angry.

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2.10 On August 5, 2004, Appellant was placed on home assignment pending an investigation of

another incident with Mr. Wilburn, which occurred in late July. The allegations of that

investigation related to inappropriate workplace behavior and possible harassment, and Mr. Wilburn

was placed on administrative leave as well. Although the University had not completed the

investigation into the incident between Mr. Wilburn and Appellant, the University returned

Appellant to the workplace after terminating Mr. Wilburn due to untruthful statements in his

employment application.

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2.11 When Appellant returned from administrative leave on August 18, he met with Mason

Hudson, Assistant Director for the UWMC Human Resources department. Mr. Hudson cautioned

Appellant about his interactions with the parties who were involved in the case involving Mr.

Wilburn. Mr. Hudson specifically cautioned Appellant against speaking to Ms. Fernandez, who had

been a part of that investigation, when Appellant indicated he wanted to speak to her.

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2.12 Despite Mr. Hudson's caution, Appellant approached Ms. Fernandez to inquire why she was

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with "trouble makers." Ms. Fernandez credibly testified that she told Appellant that she did not want to speak with him anymore. Despite Ms. Fernandez' request, Appellant continued to call her cell phone and leave messages. In one message Appellant used a profane term to describe Mr. Hudson and in another he told Ms. Fernandez she and her friends could "go to hell."

2.13 In late August Ms. Kassa observed Ms. Fernandez crying. When Ms. Kassa asked why Ms. Fernandez was so upset, Ms. Fernandez indicated that she was scared of Appellant, that he appeared to be following her and was leaving her messages. Ms. Fernandez replayed one of the voice mail messages Appellant had left her for Ms Kassa to hear. Ms. Kassa credibly testified that she recognized Appellant's voice calling Ms. Fernandez a "big liar" in an angry tone. Ms. Fernandez expressed her fear of Appellant and her fear of reporting his behavior, both because she did not want to jeopardize her job or Appellant's job. Ms. Kassa, nonetheless, encouraged Ms. Fernandez to report Appellant to a supervisor.

2.14 On August 31, Ms. Fernandez approached Gary Butrymowicz, Director for Environmental Services, and told him she felt threatened by Appellant's actions. Ms. Fernandez described recent incidents where Appellant walked by her and made "scolding" noises, an occasion where he called her "sweetie," his attempts to sit close to her in the cafeteria, and a voicemail message where he said that everything Ms Fernandez had told human resources were lies. Ms. Fernandez expressed her fear of Appellant.

2.15 On September 1, 2004, Ms. Fernandez was sitting at a table in the cafeteria when Appellant arrived and sat at a table behind her. Ms. Fernandez felt uncomfortable with Appellant sitting near her, so she turned her back towards him. Security Officer Donald Pozorski was in the cafeteria and observed Appellant sitting at a table adjacent to where Ms. Fernandez sat. Appellant had a newspaper open in his hands, but his stare was fixed at Ms. Fernandez. Officer Pozorski stayed in

the area to observe Appellant's behavior, and he tried to make eye contact with Appellant, but he was unsuccessful. Appellant continued to stare at Ms. Fernandez for several more minutes even as he flipped the pages of the paper. Officer Pozorski later spoke to Ms. Fernandez, and encouraged her to file a workplace violence report.

2.16 Ms. Fernandez filed a formal complaint which ultimately led to Appellant's termination.

2.17 Appellant denies he engaged in any harassing or intimidating behavior toward Ms. Fernandez. Rather, Appellant contends he and Ms. Fernandez were in a consensual romantic relationship, which he terminated on either June 21 or 22, 2004, and that Ms. Fernandez and her friends began to target him with acts of harassment and lies. We do not find Appellant credible. Whether or not a romantic relationship existed between Appellant and Ms. Fernandez is irrelevant because Ms. Fernandez clearly asked Appellant to stop contacting her. In addition, Mr. Hudson directed Appellant not to contact Ms. Fernandez at work, as well as did Ms. Kassa, who plainly told him to stay away from Ms. Fernandez. Nonetheless, Appellant repeatedly attempted to communicate with Ms. Fernandez, and although his calls to her were during his off duty hours, he

was making statements to her that related to issues occurring in the workplace.

2.18 Furthermore, there is no evidence to support Appellant's contention that Ms. Fernandez' report against Appellant was a part of any scheme to cause Appellant trouble. In fact, Appellant admits that he called Ms. Fernandez on numerous occasions to ask why she was mad at him and he admits he called her a liar; on the other hand, Ms Fernandez never responded to any of his calls after June 20. Appellant also admits he was upset because Ms. Fernandez would not respond to his calls or tell him why she refused to speak with him. Finally, Ms. Fernandez' reluctance to come forward and report Appellant was due to her fear of jeopardizing her job and because she did not want to cause Appellant any harm. Under the circumstances, the evidence supports that Appellant

engaged in a pattern of harassing and intimidating behavior toward Ms. Fernandez, which reasonably caused her to fear for her safety at work.

2.19 The University has adopted and published a policy which addresses workplace violence and prohibits any act of workplace violence and inappropriate conduct committed on UWMC property. The policy contains four definitions of workplace violence and inappropriate behavior. The definition which applies here defines conduct by co-workers and states that this type of conduct "involves verbal threats, threatening behavior ... by an assailant who has some employment related involvement with the workplace." Respondent most recently provided Appellant with the workplace violence report in January 2001.

III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that Ms. Fernandez' account of the events is more credible than Appellant's and supports that Appellant engaged in a pattern of harassment and intimidation. Respondent asserts that Appellant's behavior included unwanted phone calls and comments to Ms. Fernandez and unwanted harassment of her friends. Respondent argues that Appellant's off-campus behavior impacted the workplace and that Appellant's termination was the only appropriate sanction to uphold the University's responsibility to provide a safe and harassment free workplace

not only for Ms. Fernandez, but all University employees.

3.2 Appellant admits that certain events occurred, but he asserts that Respondent has blown them out of proportion and they do not rise to the level of misconduct. Appellant asserts that if his actions, such as being in Ms. Fernandez' work vicinity when he (Appellant) had work duties in the same area, are found to be misconduct, he was never clearly apprised of the departmental policy prohibiting such conduct. Appellant further asserts that most of the University's case relies upon actions outside the workplace, and that Ms. Fernandez never clearly told him to stop calling her.

to establish a connection between his off-duty conduct and his workplace. Appellant argues that the 2 University had no basis to terminate his employment. 3 4 IV. CONCLUSIONS OF LAW 5 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter. 6 7 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting 8 the charges upon which the action was initiated by proving by a preponderance of the credible 9 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the 10 sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-11 240(1); <u>Baker v. Dep't of Corrections</u>, PAB No. D82-084 (1983). 12 13 4.3 Insubordination is the refusal to comply with a lawful order or directive given by a superior 14 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v. 15 Dep't of Social & Health Services, PAB No. D94-025 (1995). 16 17 4.4 Willful violation of published employing agency or institution or Personnel Resources 18 Board rules or regulations is established by facts showing the existence and publication of the rules 19 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the 20 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994). 21 22 4.5 Although Appellant's calls to Ms. Fernandez were during his off-duty hours and to her 23 personal cell phone, they negatively impacted how Ms. Fernandez felt at work, because she never 24 knew when she would run into him in the workplace. Furthermore, Appellant's action when he sat 25

Appellant argues that Respondent failed to employ a plan of progressive discipline and that it failed

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behind Ms. Fernandez in the cafeteria and stared at her was reasonably interpreted by both Ms.

Fernandez and Officer Pozorski as intimidating and threatening behavior. Appellant's actions also were out of compliance with Mr. Hudson's directive during their conversation on August 18, when Appellant returned from administrative leave. The preponderance of the evidence supports that contrary to his duty to treat other with respect, Appellant engaged in a pattern of misconduct which undermined the department's ability to ensure that its employees were protected from any form of harassment in the workplace.

4.6 Although it is not appropriate to initiate discipline based on prior formal and informal disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the level of the sanction which should be imposed here. <u>Aquino v. University of Washington</u>, PAB No. D93-163 (1995).

4.7 In determining whether a sanction imposed is appropriate, consideration must be given to the facts and circumstances, including the seriousness and circumstances of the offenses. The penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

4.8 Respondent had reasonable cause to terminate Appellant. A preponderance of the evidence supports that Appellant engaged in a pattern of harassment and intimidation toward Ms. Fernandez, and we are not persuaded that his conduct, which included repeated phone calls to Ms. Fernandez in which he raised work issues, had no impact on Ms. Fernandez work environment. In this case, Appellant's behavior clearly intimidated Ms. Fernandez and she feared having contact with him at work. Termination is appropriate under the circumstances, and the appeal of Robert Evans should be denied.

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3	V. ORDER		
4	NOW, THEREFORE,	IT IS HEREBY ORDERED that the appeal of Robert Evans is denied.	
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6	DATED this	, 2006.	
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